

**/81UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

HERMÈS INTERNATIONAL and
HERMÈS OF PARIS, INC.,

Plaintiff,

v.

MASON ROTHSCHILD,

Defendant.

**CONTAINS CONFIDENTIAL
MATERIALS FILED UNDER SEAL**

Civil Action No. 22-cv-00384-JSR

**PLAINTIFFS' RULE 56.1 STATEMENT OF MATERIAL FACTS
IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Plaintiffs Hermès International and Hermès of Paris, Inc. (collectively, “Hermès”), in support of their Motion for Summary Judgment, submit this Statement of Material Facts pursuant to Local Rule 56.1 for which there are no genuine issues of material fact to be tried. Hermès relies on the Declarations of Nicolas Martin (“Martin Decl.”), Dr. Scott Duke Kominers (“Kominers Decl.”), Dr. Kevin Mentzer (“Mentzer Decl.”), Dr. Bruce Isaacson (“Isaacson Decl.”), and Megan A. Corrigan (“Corrigan Decl.”) as well as the exhibits attached thereto.

CLAIM: TRADEMARK DILUTION

A. BIRKIN MARK IS FAMOUS

i. The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties

1. Hermès’s origin dates back to 1837, when it began designing and manufacturing high-quality harnesses for horses. During the twentieth century, Hermès expanded its business to include handbags, personal leather goods, and apparel, among other goods. **Authority:** Martin Decl. at ¶ 3.

2. Hermès is well known for its iconic BIRKIN handbag, which is an exclusive Hermès design that was created in 1984 by the late President and Artistic Director of Hermès, Jean-Louis Dumas for actress Jane Birkin and first sold in U.S. commerce in 1986. This bag is universally known as the BIRKIN handbag. **Authority:** Martin Decl. at ¶ 6.

3. Over time, the BIRKIN handbag has become one of Hermès’s most iconic products, if not its most iconic product. **Authority:** Martin Decl. at ¶ 7.

4. Hermès spends ██████████ in advertising. Since 2016, Hermès has spent over ██████████ in U.S. advertising, which includes advertising the BIRKIN handbag. **Authority:** Martin Decl. at ¶ 12, Ex. 2.

5. By way of example, in the U.S. for Fall/Winter 2020, Hermès spent [REDACTED] in advertising the BIRKIN handbag in print publications. **Authority:** Martin Decl., Ex. 3.

6. The BIRKIN handbag and BIRKIN Mark (as defined herein) have been advertised in widely distributed publications such as the *WSJ Magazine*, *Architect Digest*, *Town & Country*, *Departures*, *Elle*, *W*, *Vogue*, *Harper's Bazaar*, *Vanity Fair*, and the *New York Times Style Magazine*. **Authority:** Corrigan Decl., Ex. 1; Martin Decl., Ex. 3.

7. The BIRKIN handbag and BIRKIN Mark regularly receive unsolicited press coverage in the U.S. in major fashion publications such as *Vogue*, *Harper's Bazaar*, *New York Times Style Magazine*, *Vanity Fair*, *Marie Claire*, *W*, *Allure*, *Elle*, *WWD*; have been featured in *WSJ Magazine*, *Forbes*, and *Departures*; and have received online coverage in *CNN Business* and *Time*. **Authority:** Corrigan Decl., Ex. 2.

8. The BIRKIN handbag and BIRKIN Mark also receive unsolicited coverage in international fashion publications, including for example, *Harper's Bazaar* editions in Indonesia, India, and Taiwan, *In Style* in Germany, *Marie Claire* Hong Kong, *Prestige* Malaysia, *Elle* editions in Germany and Australia, *Glam* in Qatar, *Female* Malaysia's leading fashion & beauty magazine, *Flare* Canada's fashion magazine, *Vogue* Italy, and *Madame Figaro* in France, among others around the world. **Authority:** Corrigan Decl., Ex. 3.

9. The BIRKIN handbag has been featured in numerous U.S. television shows and movies over the years, including for example, *Sex and the City*, *Gossip Girl*, *Gilmore Girls*, Apple TV+'s *Loot*, *Unbreakable Kimmy Schmidt*, *Inventing Anna*, *The Proposal*, *Transformers*, *Inside Man*, *The Royal Tenenbaums*, *Fifty Shades Freed*, *The Women*, *The Hustle*, *Tenet*, *The Bling Ring*, *Midnight in Paris*, *Made of Honor*, *Think Like A Man*, *What Men Want*, *Little*,

Rizzoli & Isles, Brooklyn Nine-Nine, Jessica Jones, and Velvet Buzzsaw. **Authority:** Corrigan Decl., Ex. 4.

ii. *The amount, volume, and geographic extent of sales of goods or services offered under the mark*

10. The BIRKIN handbag is distributed exclusively through Hermès's stores. As of December 31, 2021, Hermès had over 303 stores across the world, with 73 stores in Europe, 47 in the Americas (including 31 in the U.S.), 95 in Asia, and 6 in Oceania. Hermès has since opened two additional stores in the U.S., for a total of 33. **Authority:** Martin Decl. at ¶ 11, Ex. 1.

11. The price of a BIRKIN handbag varies from thousands of dollars to over one hundred thousand dollars. The price of the BIRKIN handbag has increased over the years.

Authority: Martin Decl. at ¶ 9.

12. Since the first sale of the BIRKIN handbag in 1986, Hermès has sold more than [REDACTED] worth of BIRKIN handbags in the U.S. In the past 10 years, Hermès's has annually sold over [REDACTED] U.S. dollars' worth of BIRKIN handbags in significant quantities in the U.S. **Authority:** Martin Decl. at ¶ 10.

iii. *The extent of actual recognition of the BIRKIN mark*

13. In Defendant's marketing for the METABIRKINS NFTs (as described herein), he described the BIRKIN handbag as "Herm[è]s' most famous handbag" and a "highly covetable 'holy grail' handbag." **Authority:** Corrigan Decl., Ex. 5 at HERMES_0009806; Ex. 6 at HERMES_0037671.

14. Defendant stated in a December 6, 2021 interview with *Yahoo! Finance* that for him, "there's nothing more iconic than the Hermes Birkin bag." **Authority:** Corrigan Decl., Ex. 7 at HERMES_0010582.

15. The March 2021 edition of *Harper's Bazaar* contained an editorial dedicated to the BIRKIN handbag titled, "The Mighty, MIGHTY Birkin." The article discusses "[h]ow the [BIRKIN handbag] withstood trends and WEATHERED SEASONS to become an INDELIBLE PART of the CULTURE." **Authority:** Corrigan Decl., Ex. 8 at HERMES_0001769.

16. A September 2021 *Vanity Fair* article noted that, "There is a kind of fashion object so long-lasting, so tirelessly wanted that its name becomes recognizable, a metonym for the brand that made it: the Air Jordan, the Love bracelet. Few brands, successful though they may be, attain that kind of saturation. Hermès has done it twice: the Birkin and, arguably the first of the household-name phenomena, the Kelly." **Authority:** Corrigan Decl., Ex. 9 at HERMES_0037579.

*iv. BIRKIN Mark is registered on the principal register*¹

*v. BIRKIN Mark has a significant degree of inherent distinctiveness*²

B. DEFENDANT IS MAKING COMMERCIAL USE OF BIRKIN MARK IN COMMERCE³

C. DEFENDANT'S USE BEGAN AFTER BIRKIN MARK WAS FAMOUS

17. Defendant first began using the METABIRKINS Mark as early as November 7, 2021. **Authority:** Corrigan Decl., Ex. 10 at Rothschild006657; Ex. 11.

18. The BIRKIN handbag has been famous in the U.S. for many years, and at least prior to Defendant's use. **Authority:** Martin Decl. at ¶ 15.

D. DEFENDANT'S USE OF BIRKIN DILUTES QUALITY OF BIRKIN MARK

19. For decades, Hermès has developed its reputation and distinctive image as a luxury fashion house of high-quality merchandise and has invested substantially in developing its

¹ See Infringement Element A, *infra*.

² See Infringement Element B, *infra*.

³ See Infringement Element C, *infra*.

goodwill in the HERMÈS Mark (as defined herein), BIRKIN Mark, and BIRKIN Trade Dress (as defined herein), which are all known worldwide. The BIRKIN Mark and BIRKIN handbag are famous and among Hermès's most valuable assets. **Authority:** Martin Dec. at ¶ 14.

20. Hermès has invested significant time and money in making Hermès what it is today, including in making the BIRKIN handbag what it is today. Considering what could be Hermès's future with the metaverse and NFTs, the fact that Defendant launched his METABIRKINS NFTs first, whatever Hermès will do, there will always be a reference to what Defendant has done. It has caused irreparable harm to Hermès. Today, whatever Hermès does in the metaverse or with NFTs, there will always be a tie to Defendant or METABIRKINS. Consumers could become newly confused as they might not believe, for example, that Hermès's NFTs are really from Hermès. Indeed, entering the NFT market with the BIRKIN trademark is becoming more difficult for Hermès because the METABIRKINS name has already been used for an NFT. **Authority:** Martin Decl. at ¶ 24, Exs. 6-8; Corrigan Decl., Ex. 12 at 273:24-274:25.

21. Defendant has harmed Hermès's "goodwill and [its] capacity to exploit and to use [its] trademark Birkin and [its] trade dress in the metaverse and in the NFT." **Authority:** Corrigan Decl., Ex. 12 at 277:23-278:3.

CLAIM: TRADEMARK INFRINGEMENT & FALSE DESIGNATION OF ORIGIN

A. OWNERSHIP OF BIRKIN AND HERMÈS TRADEMARKS

22. Hermès owns the BIRKIN trademark which registered on the Principal Register of the U.S. Trademark and Patent Office ("USPTO") on September 6, 2005 under Registration No. 2991927 (the "BIRKIN Mark"). **Authority:** Corrigan Decl., Ex. 13 at HERMES_0007355; Martin Decl. at ¶ 5.

23. The BIRKIN handbag was first sold under the BIRKIN Mark in commerce in the U.S. in 1986. **Authority:** Corrigan Decl., Ex. 14 at HERMES_0007674; Martin Decl. at ¶¶ 5, 10.

24. Hermès owns the BIRKIN trade dress which registered on the Principal Register of the USPTO on March 29, 2011 under Registration No. 3936105 (the “BIRKIN Trade Dress”). **Authority:** Corrigan Decl., Ex. 14 at HERMES_0007674; Martin Decl. at ¶ 5.

25. Hermès owns several registrations for the HERMÈS trademark which are registered on the Principal Register of the USPTO for a wide array of goods and services, including Registration Nos. 930149, 4278653, 2213940, 368785, 369271, 369681, 1450841, 370082, 909653, 369944, 858299, 3198963, 3036116, 1099896 (collectively, the “HERMÈS Mark”). **Authority:** Corrigan Decl., Ex. 15; Martin Decl. at ¶ 4.

26. Hermès owns pending U.S. Application Serial Nos. 97566629 for BIRKIN and 97566611 for HERMÈS, in connection with non-fungible tokens (NFTs) and related goods and services. **Authority:** Corrigan Decl., Exs. 16-17; Martin Decl. at ¶ 19.

B. VALIDITY OF BIRKIN AND HERMÈS MARKS

27. The BIRKIN Mark is in full force and effect for leather or imitation leather goods, namely, handbags. **Authority:** Corrigan Decl., Ex. 13; Martin Decl. at ¶ 5.

28. The BIRKIN Mark, registered on the USPTO Principal Register, became incontestable on February 9, 2012, and has been continuously used since its registration. **Authority:** Corrigan Decl., Ex. 13; Martin Decl. at ¶ 5.

29. The BIRKIN Mark is strong and distinctive for handbags. **Authority:** Corrigan Decl., Ex. 18 at 7.

C. USE BY DEFENDANT OF BIRKIN MARK IN INTERSTATE COMMERCE

30. Non-fungible tokens (“NFTs”) are digital records of ownership, typically recorded on a public ledger called a blockchain; NFTs may, or may not, be associated with and/or represent ownership of a digital or physical asset. **Authority:** Mentzer Decl., Ex. 1 at 7-8; Kominers Decl., Ex. 1 at 5.

31. “Like in the way that physical deeds serve as ownership records for land or other physical property, NFTs are often used as a form of ‘digital deed’ representing ownership in digital or physical assets.” **Authority:** Kominers Decl., Ex. 1 at 5.

i. Plans to Launch BIRKIN NFTs

32. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 19 at Rothschild008291.

33. [REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 20 at Rothschild008347; Ex. 21 at 143:2-17.

34. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. Ex. 21 at 146:24-147:9; Ex. 22 at Rothschild008383-8386.

35. [REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 23 at Rothschild008391-92.

ii. METABIRKINS Smart Contract and Minting

36. Prior to December 2, 2021, [REDACTED]

[REDACTED] a smart contract to generate NFTs identified by the name METABIRKINS. **Authority:** Mentzer Decl., Ex. 1 at 10; Corrigan Decl., Ex. 21 at 258:21-261:13.

37. A smart contract is computer code placed on the blockchain. The smart contract creates the rules as to what NFTs are called, how NFTs are generated, how they can be sold or transferred, and how digital files become associated with NFTs. **Authority:** Mentzer Decl., Ex. 1 at 9, 10, 16, 21 n. 9, 24, 29; Corrigan Decl., Ex. 21 at 258:21-261:9, 378:24-379:4.

38. Defendant currently controls the smart contract that created the METABIRKINS NFTs. **Authority:** Mentzer Decl., Ex. 1 at 9, 10, 16, 21 n. 9, 24, 29; Corrigan Decl., Ex. 21 at 258:21-261:9, 378:24-379:4

39. At the direction of Defendant, the METABIRKINS smart contract creator assigned the METABIRKINS name to the NFTs created by this contract. **Authority:** Mentzer Decl., Ex. 1 at 11, 16-17, & 29; Corrigan Decl., Ex. 21 at 258:21-261:9.

40. The METABIRKINS smart contract permits the controller of the smart contract to associate the NFTs with digital files which are not recorded on the blockchain. The controller of the METABIRKINS smart contract can change the digital files associated with the METABIRKINS NFTs at any time. **Authority:** Mentzer Decl., Ex. 1 at 11, 16-17, & 29; Corrigan Decl., Ex. 21 at 258:21-261:9.

41. To determine who would receive the METABIRKINS NFTs, Defendant created a whitelist, which is a list of crypto wallets pre-approved to generate the METABIRKINS NFTs. **Authority:** Mentzer Decl., Ex. 1 at 9.

42. By whitelisting crypto wallets, Defendant sold each crypto wallet owner the right to generate a METABIRKINS NFT, at the cost of 0.1 Ether (~\$450 at the time of minting). The process of generating NFTs and transferring them to their first owners is called minting.

Authority: Mentzer Decl., Ex. 1 at 7, 9, 10-15.

43. The minting process began on the morning of December 2, 2021 UTC when Defendant began adding the 100 crypto wallets to the METABIRKINS whitelist. **Authority:** Mentzer Decl., Ex. 1 at 12-13.

44. On the evening of December 2, 2021 UTC, the whitelist spot holders began minting the METABIRKINS NFTs. Minting was completed by the evening of December 3, 2021 UTC, in less than 24 hours. **Authority:** Mentzer Decl., Ex. 1 at 14-15.

45. During the time period when the METABIRKINS NFTs were initially sold, the digital files associated with the METABIRKINS NFTs depicted images of shrouds covering an unidentified object. All initial sales of METABIRKINS NFTs occurred during the time when the METABIRKINS NFTs were associated with images of shrouds. **Authority:** Corrigan Decl., Ex. 21 at 227:16-228:3; Ex. 24; Kominers Decl., Ex. 1 at 25; Mentzer Decl., Ex. 1 at 15-19 (screenshot of Figure 9 on page 17 is depicted below).



46. During the minting process, the METABIRKINS NFTs were still associated with the shrouded image above, and 16 METABIRKINS NFTs were sold or transferred prior to the images being replaced with the digital files depicting furry BIRKIN handbags. These shrouded images were called “MetaBirkins” in the OpenSea marketplace where Defendant promoted and made available for sale the METABIRKINS NFTs. **Authority:** Corrigan Decl., Ex. 21 at 249:17-250:4; Mentzer Decl., Ex. 1 at 15-19.

47. After minting ended on December 3, 2021 UTC, Defendant caused the shrouded image files associated with the newly minted METABIRKINS NFTs to be replaced with images like that shown below. **Authority:** Mentzer Decl., Ex. 1 at 19 (screenshot of Figure 11 on page 18 depicted below).



48. These new image files depicted handbags which copy the registered trade dress of the BIRKIN handbag. In these new image files, Defendant intended to replicate the features and ultimately the value of a BIRKIN handbag. **Authority:** Corrigan Decl., Ex. 6 at HERMES_0037671; Ex. 12 at 68:1-22; Ex. 21 at 147:18-148:1.

49. Defendant offered the METABIRKINS NFTs for sale on the OpenSea, Rarible, Zora, LooksRare, and Coinbase NFT marketplaces, in online stores that he identified as “MetaBirkins.” **Authority:** Corrigan Decl., Ex. 18 at 5-7; Exs. 25-28.

50. Through July 2022, total sales volume for METABIRKINS NFTs exceeded \$1.1 million. **Authority:** Mentzer Decl. Ex. 1, at 21, 48.

iii. Defendant Always Intended to Make Multiple Releases of METABIRKINS NFTs

51. Even before minting, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Authority: Corrigan Decl., Ex. 29 at Rothschild014949, Rothschild014952, Rothschild014957.

52. After minting, [REDACTED]

[REDACTED]

[REDACTED]

Authority: Corrigan Decl., Ex. 30 at Rothschild015036.

53. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex.

31 at Rothschild015053.

54. [REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 32 at Rothschild015215.

55. After Hermès's December 16, 2021 cease and desist letter to Defendant,

[REDACTED]

[REDACTED] **Authority:** Martin

Decl. Ex. 4; Corrigan Decl., Ex. 33 at Rothschild009768.

iv. Commercialization of the METABIRKINS Brand

56. Before, during, and after minting, Defendant promoted and marketed the METABIRKINS NFTs as a digital brand. He went so far as to draw parallels between his METABIRKINS NFTs and the most successful digital branded NFTs: Bored Ape Yacht Club and Doodles. **Authority:** Kominers Decl., Ex. 1 at 1, 16, & 33.

57. The marketplace also viewed the METABIRKINS NFTs as digital brand NFTs because the trading price history and patterns of the METABIRKINS NFTs resembled those of NFT projects which were associated with established brands, had significant upfront investments, or had prior audiences. **Authority:** Kominers Decl., Ex. 1 at 42-52.

58. For example, NFTs offered by Gucci, Nike, and Adidas traded for thousands of dollars to tens of thousands, which reflect being associated with an established brand with these brands' NFTs. **Authority:** Kominers Decl., Ex. 1 at 22.

59. Dr. Kominers analyzed trading patterns of 413 NFTs minted around the same time as the METABIRKINS NFTs and found that the METABIRKINS NFTs traded for a higher average price than all but one NFT, NEOTOKYO, which was created by a collection of venture capital funds, developers, and others trying to develop metaverse gaming platforms and whose social media channels had hundreds of thousands if not millions of followers at the time of minting (METABIRKINS Twitter had approximately 5,500 followers at the time of minting). **Authority:** Kominers Decl., Ex. 1 at 42-43.

60. The only factor that explains the METABIRKINS NFTs pricing is the Defendant's adoption of the BIRKIN Mark, the BIRKIN Trade Dress, and the Hermès brand to promote and market the METABIRKINS NFTs. **Authority:** Kominers Decl., Ex. 1 at 52.

61. Defendant's proffered expert, Dr. Blake Gopnik, provided an expert report stating that "NFT'd images made to mimic a purse sold at Walmart would be sure to get little artistic

transaction in our Hermès-mad culture. The Kominers report submitted in this case is quite right to note that the success of Rothschild’s ‘MetaBirkins’ depends on their connection to the Hermès brand.” **Authority:** Corrigan Decl., Ex. 34, ¶ 35.

62. Defendant copied the attributes and promotional efforts of successful digital brand NFTs to market the METABIRINS NFTs. **Authority:** Kominers Decl., Ex. 1 at 16-34; Corrigan Decl., Ex. 21 at 218:9-19, 223:13-224:11, 225:11-18.

63. For example, Defendant made public promises of utility like air drops of related brand assets, including replicating an [REDACTED] (Defendant’s pink horse image at left compared to the orange Hermès bag charm at right below) [REDACTED] **Authority:** Corrigan Decl., Ex. 21 at 179:24-181:3; Ex. 35 at SACKS_000253-254; Ex. 36 at 198:16-199:14; Kominers Decl., Ex. 1 at 52-53.



64. Defendant also created a dedicated website and social media accounts for the METABIRKINS NFTs. **Authority:** Corrigan Decl., Ex. 18 at 4-5; Ex. 21 at 29:16-30:23.

65. Defendant owns and operates for his benefit, a website at the domain name <MetaBirkins.com> (the “METABIRKINS Website”). **Authority:** Corrigan Decl., Ex. 18 at 4; Ex. 21 at 32:14-19.

66. The METABIRKINS Website was registered on November 7, 2021. **Authority:** Corrigan Decl., Ex. 11.

67. Defendant maintains, controls, and uses for his benefit, a Twitter account using the handle @MetaBirkins (the “METABIRKINS Twitter”). **Authority:** Corrigan Decl., Ex. 18 at 4; Ex. 21 at 29:16-30:23.

68. Defendant maintains, controls, and uses for his benefit, an Instagram account using the handle @MetaBirkins (the “MEABIRKINS Instagram”). **Authority:** Corrigan Decl., Ex. 18 at 5; Ex. 21 at 29:16-30:23.

69. Additionally, Defendant created and actively engaged with a METABIKRINS community. Defendant created, runs, and operates for his benefit, the METABIRKINS Discord server (the “METABIRKINS Discord”). **Authority:** Kominers Decl., Ex. 1 at 27, 36; Corrigan Decl., Ex. 18 at 5; Ex. 21 at 31:11-15.

70. Defendant utilized Discord moderators and managers to actively engage with his METABIRKINS community. [REDACTED]

[REDACTED] **Authority:** Kominers Decl., Ex. 1 at 27, 36; Corrigan Decl., Ex. 21 at 31:16-20.

71. Defendant uses the METABIRKINS Twitter, METABIRKINS Instagram, METABIRKINS Website, and METABIRKINS Discord, to promote and advertise the METABIRKINS collection of NFTs and his METABIRKINS branded commercial activities. **Authority:** Corrigan Decl., Ex. 6; Ex. 37 HERMES_0008348 at 8349-8350, 8523-8533, 8713-8719, 8732-8764, 8818-8822; Ex. 38 HERMES_0009089 at 9416-9432; Ex. 39.

72. Defendant also cross-promoted the METABIRKIN NFTs with other NFT projects, for example, he used the METABIRKINS Twitter, METABIRKINS Instagram, and

METABIRKINS Discord to promote and advertise his I Like You You're Weird ("ILYYW") NFTs. **Authority:** Corrigan Decl., Ex. 37 at HERMES_0008348 at 8391-8405 Ex. 38 HERMES_0009089 at 9420; Exs. 40-41; Kominers Decl., Ex. 1 at 38.

73. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 42 at 21:18-22:3.

74. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 35 at SACKS_000252.

75. Had Hermès not taken action to stop Defendant's digital brand activities, he likely would have continued with the same digital brand building activities mapped out in his ILYYW NFT project. These activities included promises of utility like "pet" companions to holders' ILYYW characters, collaborations with a metaverse based game platform (Blankos) to create playable characters based on the images associated with holders' ILYYW NFTs, and designing and gifting digital assets co-branded with other NFT projects (e.g., METABIRKINS NFTs with images using ILYYW color patterns). **Authority:** Kominers Decl., Ex. 1 at 38-39.

76. Defendant incentivized himself to continue providing utility to METABIRKINS NFT holders by setting a royalty or creator fee. Defendant earned a creator fee for every resale of a METABIRKINS NFT on each NFT platform where METABIRKINS NFTs were and are offered for sale. This royalty was typically set at 7.5% of the sale price. **Authority:** Mentzer Decl., Ex. 1 at 5, 8-9, 17-27.

77. Defendant has continued publicly promising utility to METABIRKINS NFTs holders since the filing of this lawsuit. On August 16, 2022, Defendant discussed token gated events and promised "passes" to METABIRKINS NFT holders for access to "IRL [In Real Life]

experience[s] . . . where [Terminal 27 is] partnering with different fashion brands . . . ” and to “different discounts and stuff.” **Authority:** Kominers Decl., Ex. 3 at 76:16-79:10.

78. Defendant admits that the future value of the METABIRKINS NFTs would come not from the art associated with the NFTs but instead would come from the publicity, community activities, and other forms of utility offered to METABIRKINS NFT holders.

Authority: Kominers Decl., Ex. 3 at 47:25-48:12.

79. Defendant’s digital brand activities for the METABIRKINS NFTs stand in stark contrast to art-only NFTs, which serve only to convey ownership of digital imagery and collectibles and do not also provide utility and other promotional activities. **Authority:** Kominers Decl., Ex. 1 at 32.

80. In recent live audio interviews on Twitter Spaces, Defendant acknowledged the art-only and digital brand segments of the NFT market, while renaming them “art driven” and “utility driven.” Defendant criticized Gucci for offering “useless” NFTs that have “diluted” Gucci’s Web3 brand due to the lack of utility. Defendant explained that his fashion boutique, Terminal 27, is helping “fashion brands to enter Web3” by launching these two different types of NFTs. **Authority:** Kominers Decl., Ex. 2 at 1-2; Ex. 3 at 11:19-12:11; 56:1-24.

81. Defendant goes as far as to advocate that brands engage in the same kinds of utility driven promotion he engaged in with the METABIRKINS NFTs: “prolong the engagement with your customer or your kind of client long-term by just constantly reward them [with utility]” **Authority:** Kominers Decl., Ex. 3 at 12:6-8.

82. Dr. Gopnik, Defendant’s art expert, admits that “‘NFT art,’ as commonly understood, simply does not exist.” Rather, Dr. Gopnik claims that the act of buying and selling

NFTs may be a form of performance art that he calls “business art.” **Authority:** Corrigan Decl., Ex. 43 at 179:25-180:14, 181:4-8, 183:3-10; 184:3-19; 188:2-11; Ex. 44.

83. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 45 at 19:4-19:14.

D. USE BY DEFENDANT OF BIRKIN MARK IN MANNER LIKELY TO CAUSE CONFUSION

i. Strength of BIRKIN Mark

84. The BIRKIN Mark is strong for handbags. **Authority:** Corrigan Decl., Ex. 18 at 7.

85. The BIRKIN Mark is distinctive for handbags. **Authority:** Corrigan Decl., Ex. 18 at 7.

86. The BIRKIN Mark was distinctive at least as of September 6, 2005, when the BIRKIN Mark registered with the USPTO. **Authority:** Corrigan Decl., Ex. 13; Martin Decl. at ¶ 5.

ii. Similarity of BIRKIN Mark and METABIRKINS Mark

87. METABIRKINS consists of the term “META” referring to the “metaverse” and Hermès’s BIRKIN Mark. **Authority:** Martin Decl. at ¶ 18; Corrigan Decl., Ex. 18 at 8.

88. The entirety of Hermès’s BIRKIN Mark is contained within Defendant’s METABIRKINS Mark. **Authority:** Martin Decl. at ¶ 18.

89. Defendant referred to the NFTs as “Birkins” publicly and in conversations with friends and business contacts. **Authority:** Corrigan Decl., Ex. 21 at 47:18-148:1; Ex. 46; Ex. 47 at Rothschild008467-8469; Ex. 48 at Rothschild014566; Ex. 49 at Rothschild008328; Ex. 50 at Rothschild008679.

90. The whitelist page to “mint” the METABIRKINS NFTs referred to the NFTs as “Birkins.” **Authority:** Corrigan Decl., Ex. 51; Mentzer Decl., Ex. 1 at 13-14.

91. [REDACTED]
[REDACTED] **Authority:** Corrigan Decl., Ex. 21 at 147:18-148:1.

92. [REDACTED]
[REDACTED]
[REDACTED] **Authority:** Corrigan Decl., Ex. 35 SACKS_000252.

93. [REDACTED]
[REDACTED] **Authority:** Corrigan Decl., Ex. 36 at 121:18-21; 124:5-16; Ex. 52 at SACKS_000046; Ex. 53.

iii. Competitive Proximity of BIRKIN and METABIRKINS

94. Wearing a BIRKIN handbag is not limited to physically carrying it and using it as a vessel to carry other physical objects. It is an iconic handbag that is meant to be placed on a table or simply shown off, whether physically or virtually. A BIRKIN handbag is a symbol of status, so there is no need to physically wear it; rather, one can just show it or show evidence that they own one through an NFT. **Authority:** Martin Decl. at ¶ 16.

95. The digital images attached to the METABIRKINS NFTs are “handbags” in the digital world and “wearable” in virtual worlds. Nicolas Martin, Hermès’s designated 30(b)(6) corporate representative, testified that, “I think ‘wearable’ means a lot of things, including in particular in the metaverse, and I think you can wear the MetaBirkin on your internet account. You can wear it in [a] profile picture -- so for me it's a wearable handbag.” **Authority:** Corrigan Decl., Ex. 12 at 60:16-61:3, 67:11-15.

96. Dr. Gopnik described the METABIRKINS NFTs as an “elite metaversal commodity. . . the kind of deluxe Hermès bag a MetaKardashian might carry, in the virtual reality we will all inhabit.” **Authority:** Corrigan Decl., Ex. 34, ¶ 37.

97. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 54 at Rothschild008804.

98. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 52 at SACKS_000027.

99. [REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 21 at 167:24-169:5; Ex. 55 at Rothschild008316-8317.

100. The METABIRKINS NFTs as minted were immediately wearable or usable in certain metaverses. The current files associated with the METABIRKINS NFTs could be replaced by Defendant with three-dimensional files or other file types compatible with any number of other metaverses. **Authority:** Mentzer Decl. Ex. 1 at 28, 29, & 32-33.

101. Defendant described Web3 and the metaverse as allowing consumers to “actually own these commodities in this place where we can actually show them off.” Defendant further stated, “I was explaining to somebody before, there’s not much difference in between having the crazy car or the crazy handbag in real life because it’s just kind of that, that showing of like wealth or that kind of explanation of success. And now you’re able to bring that into the

metaverse with these iconic NFTs that have fetched crazy amounts of money in that resale market for NFTs. So I feel like the difference between the two is like getting a little bit blurred now because we have this new outlet, which is the metaverse, to showcase our product, showcase them in our virtual worlds, and even just show them online. You know, like people have been posting the ones that they've gotten.” **Authority:** Corrigan Decl., Ex. 7.

102. TikTok users posted videos showing the wearability of the METABIRKINS NFTs. TikTok user @charliegross describes the METABIRKINS NFTs as “NFT Birkins,” and stating “It’s a well-known fact that a Birkin bag is a great investment. Is a Birkin NFT as good an investment? Time will tell” and “Some people keep their Birkins in their closet, others keep them on the blockchain.” **Authority:** Corrigan Decl., Ex. 56.

103. User @arielabench posted a TikTok video titled “what’s in my metabirkin” and featuring the METABIRKIN bag sitting on a stack of fashion books on a table which appears to be on a balcony. The user then reaches her hand into the bag and pulls out varying items, including a VR headset, a bottle of vodka, a nightlight, and a law school textbook. **Authority:** Corrigan Decl., Ex. 57.

104. User @cherryemojix posted a TikTok video on the topic of what does the metaverse mean for fashion, stating, “Fashion plays a huge role in how we express our identities. So, now that we are moving into this virtual reality of having an avatar that looks just like us, that comes with buying clothes that we like.” She then says we know that virtual fashion is profitable and shows the Balenciaga and Fortnite collaboration, “but the lines between reality and virtual are going to soon blur.” She pulls up a photo of a METABIRKIN and says, “we are seeing NFT Birkins sell for almost \$4,000 US Dollars.” **Authority:** Corrigan Decl., Ex. 58.

105. Defendant ran a “Build-a-MetaBirkin” challenge on the METABIRKINS Discord. Defendant requested that followers create physical goods, not virtual goods, by “[b]uild[ing] a MetaBirkin using household materials ONLY!” and told followers to “use things like toilet paper rolls, old rags, etc.” **Authority:** Corrigan Decl., Ex. 21 at 363:20-367:17; Ex. 59.

106. Dr. Gopnik stated in his report that “[t]he cultural disturbance caused by Mason Rothschild’s ‘MetaBirkins’ – including to the Hermès company – indicates that they are exploring similar terrain.” **Authority:** Corrigan Decl., Ex. 34, ¶ 22.

107. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 21 at 194:24-195:1.

108. [REDACTED] **Authority:** Corrigan Decl., Exs. 60 - 61.

iv. Likelihood that Hermès will “Bridge the Gap”

109. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **Authority:** Martin Decl. at ¶ 20 and Exs. 6-8; Corrigan Decl., Ex. 12 at 250:4-7, 252:22-253:3.

110. [REDACTED]

[REDACTED] **Authority:** Martin Decl. at ¶ 20; Corrigan Decl., Ex. 12 at 245:2-248:18.

111. Hermès intends to use the BIRKIN and HERMÈS Marks in connection with NFT goods and services. **Authority:** Martin Decl. at ¶ 19; Corrigan Decl., Exs. 16-17.

112. Digital brand NFTs do not have to be novel and can be extensions of established real-world brands. Fashion brands, including Gucci, Nike, and Adidas, are entering the metaverse launching NFT projects around their brand assets, branded digital worlds, digital wardrobes to consumers in the metaverse, and metaverse fashion weeks with virtual models and digital apparel. **Authority:** Corrigan Decl. Exs. 62-66; Kominers Decl., Ex. 1 at 20, 22.

113. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **Authority:**

Corrigan Decl., Ex. 21 at 113:9-116:20.

114. Established brands creating NFTs seek to create engagement among their fans and consumers in digital spaces like metaverse platforms. **Authority:** Kominers Decl., Ex. 1 at 20-21.

115. Such promotion also generates brand awareness among new audiences who are more likely to interact in the digital space. **Authority:** Kominers Decl., Ex. 1 at 20.

116. Owning such fashion brand NFTs permits holders to showcase or even wear their NFTs in the metaverse as they would in the real world. **Authority:** Kominers Decl., Ex. 1 at 22.

117. Branded digital goods are available on various metaverse platforms, including Roblox, where users can buy Gucci handbags for thousands of dollars or generic, non-branded handbags for a few dollars. **Authority:** Kominers Decl., Ex. 1 at 24.

118. The digital assets associated with fashion brand NFTs can also have a real-world counterpart. Tiffany's NFTiff collection gives holders who also own a CryptoPunk NFT the

ability to redeem the NFTiff for a real-world pendant of their CryptoPunk NFT created by Tiffany’s and an NFT of the pendant. **Authority:** Kominers Decl., Ex. 1 at 24.

119. Defendant admitted that an “organic” expansion of the METABIRKINS NFTs was physical bags resembling those depicted in the image files associated with the NFTs. In the August 16 Twitter Space, Defendant’s co-host suggested that Defendant could have partnered with Hermès following the release of the METABIRKINS NFTs “to turn these into physicals. Because I actually think those bags that you [Defendant] made are super marketable by more than just someone that wants to buy an NFT image, right? . . . and everyone, you know, has these like Hermès bags that started as an NFT.” In response, Defendant added “there was definitely so much opportunity for that to be a little bit more of a fruitful situation for both kind of parties [Hermès and Defendant].” **Authority:** Kominers Decl., Ex. 3 at 52:1-16, 54:2-5.

v. *Evidence of Actual Confusion*

120. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **Authority:**

Corrigan Decl., Ex. 67 at SACKS_000109-110.

121. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 36 at 169:3-18; Ex.

112 at SACKS_000346.

122. [REDACTED]

[REDACTED]

[REDACTED] **Authority:**

Corrigan Decl., Ex. 68 at 61:3-18.

123. *Elle UK* was confused by Hermès’s affiliation with the METABIRKINS NFTs and published an article titled, “Birkin NFT: Everything You Need To Know About The ‘Handbag’ Of The Future,” reporting that Hermès had created the METABIRKINS NFTs and referred to the METABIRKINS as a BIRKIN. **Authority:** Corrigan Decl., Ex. 68 at 110:14-111:16; Ex. 69.

124. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 68 at 110:2-20; Exs. 69-71.

125. *L’Officiel*, a French fashion magazine with US edition, reported that Hermès “partnered with” Defendant and described the METABIRKINS NFTS as “a new line of Birkin bags” and “another collection of Birkin NFTs.” **Authority:** Corrigan Decl., Ex. 67 at 121; Ex. 72.

126. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 73 at Rothschild016047-16048.

127. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl. Ex. 68 at 143:15-144:17; Ex. 74.

128. The *New York Post* was confused about Hermès’s affiliation with the METABIRKINS NFTs, stating that Hermès had entered the metaverse and “unveiled the MetaBirkin-a VR version of its signature bag.” **Authority:** Corrigan Decl., Ex. 75.

129. Even months after the filing of this lawsuit, publications are still confused as to the origin of the METABIRKINS NFTs: In May, the French publication *Challenges* reported

that Hermès “unveil[ed] virtual bags under the name ‘MetaBirkin.’” **Authority:** Corrigan Decl., Ex. 76.

130. Consumers expressed confusion regarding whether the METABIRKINS NFTs were authorized, affiliated, or sponsored by Hermès. A user tweeted, which the Defendant then retweeted from the METABIRKINS Twitter, “You know what comes after the avatar/pfp frenzy? Metaverse fashion. Dressing those metaverse avatars. Digital outfits and accessories. Big brands are already experimenting with NFTs. Be early. @MetaBirkins Whitlisting now on discord [link] Minting soon.” **Authority:** Corrigan Decl., Ex. 38 at HERMES_0009435-36.

131. In response to the Defendant tweeting from the METABIRKINS Twitter, “WE’RE LIVE! #MetaBirkins,” and a link to the OpenSea, a user commented, “But are these even official Birkins @Hermes_Paris.” **Authority:** Corrigan Decl., Ex. 38 at HERMES_0009520.

132. In response to the Defendant tweeting from the METABIRKINS Twitter “gm (sun emoji) @Banks, mint a MetaBirkin, hold a MetaBirkin,” and an image of a METABIRKIN, a user commented, “Finally an NFT my wife can get on board with! Would LOVE to get her this Birken [sic] for Christmas!” **Authority:** Corrigan Decl., Ex. 38 at HERMES_0009533, 9536.

133. Another user commented on the same tweet saying, “I need this Birkin for the wifey! Please whitelist me sir. #WAGMI #MetaBirkins.” **Authority:** Corrigan Decl., Ex. 38 at HERMES_0009533, 9540.

134. A third user commented, “A Birkin I can afford for my wife!” **Authority:** Corrigan Decl., Ex. 38 at HERMES_0009533, 9541.

135. A fourth user commented, “Big Birkin!!” **Authority:** Corrigan Decl., Ex. 38 at HERMES_0009608.

136. In response to the Defendant tweeting from the METABIRKINS Twitter, “gm (sun emoji) @DavidDobrik, hold this,” and an image of a METABIRKIN, a user commented “Birkin NFT is the future of fashion!” **Authority:** Corrigan Decl., Ex. 38 at HERMES_0009544-9545.

137. In response to Defendant tweeting from the METABIRKINS Twitter, “gm (sun emoji) @CozomoMedici,” and an image of a METABIRKIN, a user commented “Hey you know what’s better than one Birkin Bag NFT. A second one with a lock. Inside of it is a free whitelist for me (: @CozomoMedici.” **Authority:** Corrigan Decl., Ex. 38 at HERMES_0009549, 9554.

138. Another user commented on the same tweet, “A birkin bag? Oh my god a birkin bag??” **Authority:** Corrigan Decl., Ex. 38 at HERMES_0009549, 9555.

139. A third user commented, “@CozomoMedici they put a \$900 million dollar painting on a Birkin?? That’s a bag on a bag!!!” **Authority:** Corrigan Decl., Ex. 38 at HERMES_0009549, 9552.

140. In response to Defendant tweeting from the METABIRKINS Twitter, “!shill,” and an image of a METABIRKIN, a user commented “Can’t wait to own a birkin.” **Authority:** Corrigan Decl., Ex. 38 at HERMES_0009598.

141. Another user commented on the same tweet saying “Need me a birkin.” **Authority:** Corrigan Decl., Ex. 38 at HERMES_0009598.

142. In response to the Defendant tweeting from the METABIRKINS Twitter, “MetaBirkins: Collection One, Now Available on @rarible (emojis),” with a link to Rarible and an image of a METABIRKIN, one user commented “daddy give me a Birkinnnnnnn.” **Authority:** Corrigan Decl., Ex. 38 at HERMES_0009605.

143. On Instagram, users made similar comments expressing confusion between BIRKIN and METABIRKINS. In response to Defendant posting on the METABIRKINS Instagram, “gm, say it back #MetaBirkins @peacevoid,” a user commented, “And also gm to @wednesdaysummers for putting me on! @bronze_bombshel since you’re the fashion history god, what do you think about Birkins (and fashion generally) entering the metaverse.” Another user commented on the same post saying, “@antnoir @alexharveyco I know you want a birkin :p” **Authority:** Corrigan Decl., Ex. 37 at HERMES_0008824-8828.

144. In response to Defendant posting on the METABIRKINS Instagram, “The Creation.. #MetaBirkins,” one user commented, “Ok, I have a couple Birkins, but NFTs? This is too awesome!!!” **Authority:** Corrigan Decl., Ex. 37 at HERMES_0008684, 8689.

145. In response to Defendant posting on the METABIRKINS Instagram, a METABIRKINS image with the text “132 ETH Volume Traded 5.9 ETH Floor Price,” with a post saying “The Whitelist: Round Two, Change your Profile Photo to your favorite #MetaBirkin, Follow @metabirkins and @masonrothschild, Like and Share this post, Tag three friend who have diamonds hands to hold #MetaBirkins #NotYourMothersBirkin #MintAMetaBirkinHoldAMetaBirkin,” one user commented, “@grecchia1 girl they giving away Birkins as beautiful NFT’s.” **Authority:** Corrigan Decl., Ex. 37 at HERMES_0008634, 8638.

146. In response to Defendant posting on the METABIRKINS Instagram, “Hold this. #MetaBirkins,” one user commented, “WL ME PLEASE . LET ME OWN MY FIRST BIRKIN . Please WL ME HIIIIIIIIIIIIIIIIIIIIII @metabirkins @metabirkins.” **Authority:** Corrigan Decl., Ex. 37 at HERMES_0008696, 8706.

147. In response to Defendant posting on the METABIRKINS Instagram, “gm (emoji) # MetaBirkins,” one user commented, “@lowebs @barleymeg okay a Birkin NFT tell Mitch and

Justin we're starting to collect expensive NFT bags lololol crazy.” **Authority:** Corrigan Decl., Ex. 37 at HERMES_0008752, 8757.

148. In response to Defendant posting on the METABIRKINS Instagram, “Monochrome #MetaBirkins, runner up to rose gold in regards to hardware rarity,” a user commented, “If you can’t get a fur Birkin in real life, get a NFT.” **Authority:** Corrigan Decl., Ex. 37 at HERMES_0008802, 8809.

149. In response to Defendant posting on the METABIRKINS Instagram, “van Gogh, Twombly & Rothko #MetaBirkins,” a user commented “BIRKIN TO THE MOON.” Another user commented on the same post, “@thedinabina @leahjgrace NFT birkins. This is crazy!” **Authority:** Corrigan Decl., Ex. 37 at HERMES_0008835, 8841-42.

150. In response to Defendant posting on the METABIRKINS Instagram, “A statement in response to Hermès International, et al. v. Mason Rothschild,” a user commented, “I just want to know how I can get one of them bags.” **Authority:** Corrigan Decl., Ex. 37 at HERMES_0008362, 8376.

151. In response to Defendant posting on the METABIRKINS Instagram, “c/o @sage.willows,” a user commented, “@tamara_powell what do you mean this guy was selling Hermes birkins without the approval of the brand. And everyone jumped on the bandwagaon now the artist is out buying MAYC lol.” **Authority:** Corrigan Decl., Ex. 37 at HERMES_0008439, 8445.

152. In preparing an NFT presentation at the end of 2021 for the AIPPI, an IP association in Paris, France, Boriana Guimberteau, a French intellectual property lawyer, became aware of the Baby Birkin NFT and believed “Hermès authorized the NFT or there was some kind of a partnership with Hermès for this NFT.” The Baby Birkin NFT was Defendant’s NFT

project that preceded his METABIRKINS NFT project. **Authority:** Corrigan Decl., Ex. 21 at 119:24-120:2; Ex. 77 at 6:20-9:21; Ex. 78.

153. An article titled, “2021 The Year of Fashion NFTs,” which Ms. Guimberteau used to prepare for her NFT presentation, included an image of the Baby Birkin NFT with the text “Image Courtesy of Hermès.” **Authority:** Corrigan Decl., Ex. 77 at 8:14-10:12; Ex. 78.

154. Ms. Guimberteau thought the METABIRKINS NFTs were from Hermès or with promoted with Hermès’s authorization. **Authority:** Corrigan Decl., Ex. 77 at 10:24-11:7.

155. During her AIPPI NFT presentation, Ms. Guimberteau presented that the Baby Birkin and METABIRKINS NFTs were “made with Hermès or by Hermès.” **Authority:** Corrigan Decl., Ex. 77 at 11:8-11:20, 13:16-14:6; Ex. 79.

156. It was Ms. Guimberteau’s understanding at the time, late 2021, that “there were a lot of fashion and luxury houses that launched NFTs” and “Hermès was also a luxury house that also launched an NFT.” **Authority:** Corrigan Decl., Ex. 77 at 13:24-14:19.

157. Ms. Guimberteau prepared and signed an Affidavit declaring that as of December 9, 2021, she “thought that these [Baby Birkin and MetaBirkins NFTs] were also made in close collaboration with HERMÈS,” because “the names of the NFTs include the famous trademark ‘BIRKIN’ and reproduced the shape of the bag.” **Authority:** Corrigan Decl., Ex. 77 at 15:24-18:2; Exs. 80-81.

158. In preparing for another presentation in December 2021, Ms. Guimberteau found an *L’Officiel* article titled, “The New NFT METABIRKIN Bags of HERMES Sold At Record Prices.” **Authority:** Corrigan Decl., Ex. 81, ¶ 8.

159. [REDACTED]

[REDACTED]

██████████ **Authority:** Corrigan Decl., Ex. 45 at 43:14-19; Ex. 82 at Rothschild015178.

160. Plaintiffs' expert, Dr. Bruce Isaacson, conducted a survey measuring the likelihood of confusion caused by Defendant's MetaBirkins.com website advertising the METABIRKINS NFTs using the BIRKIN Mark, Birkin Trade Dress, and the HERMES Mark.

Authority: Isaacson Decl., Ex. 1 at 38.

161. Dr. Isaacson is President of MMR Strategy Group, a marketing research and consulting firm and has provided expert reports or depositions regarding surveys in approximately 100 matters. Dr. Isaacson has testified on surveys in matters before federal and state courts, the National Advertising Division of the Better Business Bureau, the Trademark Trial and Appeal Board, the U.S. International Trade Commission, and other venues. **Authority:** Isaacson Decl., Ex. 1 at 16.

162. Dr. Isaacson's NFT survey was conducted among an audience of consumers likely to purchase NFTs, specifically NFTs for digital artwork, fashion apparel, or fashion accessories. **Authority:** Isaacson Decl., Ex. 1 at 20.

163. Dr. Isaacson conducted the survey to measure forward confusion: the likelihood of confusion among the junior user's audience, the purchasers of Defendant's goods and services. **Authority:** Isaacson Decl., Ex. 1 at 37.

164. Dr. Isaacson's survey found net confusion among the NFT audience of 18.7%. **Authority:** Isaacson Decl., Ex. 1 at 15.

165. Net confusion this high is typically interpreted as indicating a substantial likelihood of confusion. **Authority:** Isaacson Decl., Ex. 1 at 38.

vi. Defendant's Bad Faith in Adopting METABIRKINS

1. Defendant promoted the METABIKRINS NFTs in a manner that falsely suggested he was partnering with Hermès or otherwise had Hermès's approval.

166. Defendant advertised his NFTs as “Birkins,” including in the first ever tweet about the collection which Defendant described as “Birkins of varying rarity.” **Authority:** Kominers Decl., Ex. 1 at 52.

167. Defendant described the METABIRKINS NFTs as a “tribute to Herm[è]s’ most famous handbag, the Birkin.” **Authority:** Corrigan Decl., Ex. 6 at HERMES_0037671.

168. In a December 6, 2021 interview with *Yahoo! Finance*, Defendant stated: “I wanted to see as an experiment to see if I could create the same kind of illusion that [the BIRKIN Handbag] has in real life as a digital commodity. And I feel like I’ve kind of accomplished that with the statistics that we kind of have today, is being able to put together this kind of digital commodity everybody loves, bringing it into the digital world with this introduction of the metaverse and seeking how it works out and how it plays in the hands of lie the community, selling it a that, keeping the scarcity of 100 bags total.” **Authority:** Corrigan Decl., Ex. 7.

169. Defendant characterized the METABIRKINS NFTs as investment assets: “My goal is for MetaBirkins [sic] double as an investment for holders like the real-world ‘holy grail’ handbag.” **Authority:** Corrigan Decl., Ex. 5; Kominers Decl., Ex. 1 at 26.

170. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 45 at 82:6-11; Ex. 83.

171. [REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 68 at 149:7-23.

172. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 55 at Rothschild008307 .

173. [REDACTED]

[REDACTED]

Authority: Corrigan Decl., Ex. at 20 at Rothschild008345.

174. [REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan

Decl., Ex. 22 at Rothschild008383, Rothschild008386.

175. [REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 52 at SACKS_000047; Ex. 36 at 124:17-125:10.

176. [REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 52 at SACKS_000026.

177. [REDACTED]

[REDACTED] **Authority:**

Corrigan Decl., Ex. 35 at SACKS_000249.

178. [REDACTED]

Authority: Corrigan Decl., Ex. 84 at Rothschild017162.

179. However, Hermès [REDACTED]

[REDACTED] did not interact with Defendant before sending the December 16, 2021 cease-and-desist letter. **Authority:** Martin Decl. at ¶ 17, Exs. 4-5; Corrigan Decl., Ex. 12 at 44:7-11.

180. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 21 at 144:12-146:5.

181. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 21 at 280:23-281:10.

182. [REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 21 at 184:14-194:22; Ex. 85 at Rothshcild008526.

2. [REDACTED]
[REDACTED]

183. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 36 at 57:22-24; Ex. 86 at 49:22-23.

184. [REDACTED] **Authority:** Corrigan Decl.,

Ex. 21 at 391:24-392:24.

185. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 36 at 199:23-200:10.

186. [REDACTED]

Authority: Corrigan Decl., Ex. 42 at 48:1-48:4.

187. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 87 at
Rothschild014669.

188. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 21 at 393:22-23;
Ex. 88 at Rothschild014857-59.

189. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 21 at 392:6-8; Ex. 89 at Rothschild008648,
Rothschild008658, Rothshcild008665.

190. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 52 at SACKS_000032.

191. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 54 at Rothschild008802,
Rothschild008805-6, Rothschild008808.

192. [REDACTED]

[REDACTED] **Authority:**
Corrigan Decl., Ex. 90 at Rothschild008963.

193. [REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan
Decl., Ex. 86 at 38:24-39:12; Ex. 91 at Rothschild009090.

194. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 92 at Rothschild009283.

195. [REDACTED]

[REDACTED] **Authority:** Corrigan
Decl., Ex. 55 at Rothschild008308.

196. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 36 at 50:14-58:6.

197. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 21 at 195:16-24; Ex. 85 at Rothschild008527.

198. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 21 at 386:17-387:23; Ex. 89 at Rothschild08652.

199. [REDACTED]

[REDACTED]
Authority: Corrigan Decl., Ex. 45 at 22:24-25:25; 31:24-32:7.

200. [REDACTED]

Authority: Corrigan Decl., Ex. 23 at Rothschild008391; Ex. 47 at Rothschild008468; Ex. 95 at Rothschild011297; Ex. 96 at Rothschild017383; Ex. 97 at Rothschild008499.

201. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 45 at 44:8-17; Ex. 82 at Rothschild015179.

202. [REDACTED]

[REDACTED]
[REDACTED] **Authority:** Corrigan Decl., Ex. 45 at 64:6-16; 69:23-72:14; 73:2-11.

203. [REDACTED]

[REDACTED]
[REDACTED] **Authority:** Corrigan Decl., Ex. 45 at 15:19-17:13; 118:19-119:8; Ex. 96 at Rothschild017385.

204. [REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 45 at 26:19-21; 71:5-14.

205. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 21 at 352:-354:22; Ex. 36 at 186:22-88:22, 191:13-25; Ex. 67 at SACKS_000159.

3. Defendant cloaked his plans to profit off the HERMÈS and BIRKIN brands in a “fur free” marketing message

206. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 98 at Rothschild014825.

207. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **Authority:**

Corrigan Decl., Ex. 21 at 43:18-25, 48:4-6, 72:16-17, 84:1-89:7; Exs. 99-107.

208. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 108 at Rothschild016240.

209. Defendant rarely highlighted the alleged “fur-free” inspiration for the METABIRKINS NFTs. **Authority:** Kominers Decl., Ex. 1 at 32.

210. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex.112:6-12; Ex. 109.

4. Defendant sought to legitimize the METABIRKINS NFTs by claiming third parties were selling counterfeit NFTs

211. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 21 at 276:22-277:8.

212. Kenneth Loo set up an interview for Defendant with Cristina Criddle of the *Financial Times* to discuss “his MetaBirkins NFT and counterfeits on OpenSea.” Ms. Criddle requested numbers and screenshots of the METABIRKINS counterfeits Defendant claimed were being sold on OpenSea, but Defendant and Mr. Loo never provided the information. **Authority:** Corrigan Decl., Ex. 68 at 70:7-71:21; 72:7-72:23; Ex. 110.

213. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 43 at 145:14-17.

vii. *Respective Quality of Products*

214. The BIRKIN handbag is handcrafted from the finest leather by experienced artisans in France. The manufacturing of a single BIRKIN handbag requires more than 17 hours of an artisan’s time. The intensive labor and craftsmanship and high-quality leathers required makes the BIRKIN handbag difficult to produce and sold at high prices. The customer demand for BIRKIN handbags is such that Hermès cannot satisfy all requests. **Authority:** Martin Decl. at ¶ 8.

215. The customer demand for and value of the BIRKIN handbag continues to increase and is such that the BIRKIN handbag is considered by customers to be a financial investment.

Authority: Martin Decl. at ¶ 15.

216. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 55 at Rothschild008305.

217. [REDACTED]

[REDACTED] **Authority:**
Corrigan Decl., Ex. 111 at Rothschild008417, 8420.

218. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 113 at
Rothschild015475-76.

219. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl.,
Ex. 42 at Krejci Tr. 31:4-32:16.

220. Consumers were skeptical about the METABIRKINS NFTs and referred to Defendant's project as a "rug," with one Twitter user commenting that "13K a lot for a rugggggg." **Authority:** Corrigan Decl., Ex. 38 at HERMES_0009452.

221. In response to Defendant's Instagram post about Hermès's cease and desist letter and the subject lawsuit, one user commented, "why would they [Hermès] collaborate with someone [Defendant] who lacks originality. They built and [sic] empire. This guy ripped off their bags and made NFTs. You really on the NFT koo laid and have no clue how much of this is just pyramid schemes and rug pulls." **Authority:** Corrigan Decl., Ex. 114 at Rothschild007787-88.

DEFENDANT IS AN OPPORTUNIST AND PROMOTER NOT AN ARTIST

i. Defendant's Identity

222. Defendant's legal name is Sonny Estival, not Mason Rothschild. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 21 at 20:6-16, 26:24-27:11.

223. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 36 at 111:8-15; Ex. 45 at 20:24-21:4; Ex. 52 at SACKS_000026; Ex. 115 at EF0000081-87.

224. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 21 at 18:13-20:4, 26:11-23.

225. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 21 at 21:2-24:12, 36:10-42:3.

226. [REDACTED]

[REDACTED]
Authority: Corrigan Decl., Ex. 21 at 21:24-22:14, 41:19-42:3, Ex. 116.

227. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 21 at 40:21-42:13, Ex. 116.

228. [REDACTED]

[REDACTED] **Authority:**
Corrigan Decl., Ex. 21 at 42:4-13; Ex. 116.

229. [REDACTED]

[REDACTED]
Authority: Corrigan Decl., Ex. 21 at 48:15-55:2, 62:17-23, 171:2-11; Ex. 117.

230. Defendant's second NFT project was the Baby Birkin NFT. The Baby Birkin NFT was associated with video file depicting a fetus growing inside a BIRKIN handbag.

Authority: Kominers Decl., Ex. 1 at 24-25; Corrigan Decl., Ex. 21 at 120:1-2.

231. [REDACTED]

[REDACTED] **Authority:**
Corrigan Decl., Ex. 21 at 121:17-122:13, 417:7-24, 422:13-24.

232. The Baby Birkin NFT initially sold for \$23,500 in May 2021. **Authority:** Mentzer Decl. Ex. 1 at 28.

ii. Defendant's Claims about Celebrity Interest

233. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **Authority:**

Corrigan Decl., Ex. 21 at 406:5-414:18.

234. [REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 21 at 406:5-

414:18.

iii. Defendant's Claims About Other NFT Partnerships

235. [REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 21 at

393:22-23, 407:5-416:17; Ex. 118 at Rothschild010197-98.

iv. Defendant's Representations About Money

236. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 21 at 379:16-380:23; Ex. 119 at Rothschild009367-

68.

237. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 21 at 69:4-9, 73:10-74:1, 356:23-362:8; Ex. 120 at Rothschild010863-64 .

v. *Defendant’s Claims About Generosity*

238. Defendant sought submissions in the METABIRKINS Discord for a “Build-a-MetaBirkin” challenge. The winner would receive a whitelist spot for an unspecified NFT project. Defendant says he “has a history of giving out more” [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 21 at 363:14-369:8.

vi. *Defendant’s Claim the Generated the Images Associated with the METABIRKINS NFTs*

239. [REDACTED]

[REDACTED]

Authority: Corrigan Decl., Ex. 21 at 235:16-236:6; Exs. 47-48; Ex. 87; Ex. 121.

240. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 21 at 135:7-136:16.

241. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 21 at 155:22-156:11, 416:18-421:2

242. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan Decl.,

Ex. 68 at 155:22-156:21; Ex. 86 at 31:7-13.

243. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 21 at

140:24-142:21, Ex. 122 & Ex. 128.

244. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

Authority: Corrigan Decl., Ex. 123 at Rothshcild010189-90.

vii. Defendant Did Not Create the METABIRKINS Name

245. On October 29, 2021, Defendant ran a contest on Twitter ahead of the METABIRKINS NFTs release, describing the NFTs as “one of a kind, Birkins” and asked followers to reply with their suggestions for the collection name, and stated the “best suggestion gets a gifted Birkin.” Twitter user MAKISA responded on the same day, October 29, 2021, with seven suggestions, including “MetaBirkin.” Twitter user “JessLozano.eth in NY” responded on November 2, 2021 with several suggestions, including “not your mom’s Birkin.” **Authority:** Corrigan Decl., Ex. 46.

viii. Defendant Made Misrepresentations About this Action

246. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 21 at 382:19-383:17; Ex. 124 at Rothshcild010392.

247. On July 19, 2022, Defendant made a public statement to his METABIRKINS Discord community regarding this Court’s denial of Defendant’s Motion to Dismiss, mischaracterizing the loss as a win. The publicly available post states, “@everyone: I just wanted to update everyone on the litigation with Hermes. The judge has ruled that the First Amendment applies in our case, and we are confident that in the end *MetaBirkins will be fully protected as free artistic speech*. We’re continuing to litigate the case toward that result, and we’ll update you as the case unfolds. Thanks, everyone, for your support!” **Authority:** Corrigan Decl., Ex. 125 (emphasis added).

248. On January 17, 2022, Defendant made a public statement which said, “Hermès chose instead to break off negotiations and sue me” despite the fact that Defendant actually gave Hermès a deadline of January 14, 2022 by which Defendant would take action against Hermès.

Authority: Corrigan Decl., Ex. 21 at 333:18-335:25; Ex. 126.

ix. Defendant Statements Concerning Potential Meetings and Relationships with Hermès

249. [REDACTED]

[REDACTED]

[REDACTED]

Authority: Corrigan Decl., Ex. 20; Ex. 21 at 144:12-146:5, 148:21-149:3, 323:25-326:11, 354:9-355:21; Ex. 22; Ex. 93 at Rothschild009680.

x. Defendant’s Statements Concerning Press Coverage

250. [REDACTED]

[REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 21 at 149:4-12 & Ex. 22 at Rothschild008383-8386.

xi. Defendant’s Consideration to Others

251. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 68 at 25:2-5.

252. [REDACTED]

[REDACTED] **Authority:** Corrigan Decl., Ex. 21 at 173:19-174:9.

253. After submitting the name METABIRKINS in connection with Defendant’s naming contest, Twitter user MAKISA followed up with Defendant on Twitter to see if she was “eligible for the NFT mentioned in your initial tweet.” **Authority:** Corrigan Decl., Ex. 46.

254. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Authority: Corrigan Decl., Ex.11; Ex. 21 at 204:15-18, 207:4-17.

255. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Authority: Corrigan Decl., Ex. 46; Ex. 21

at 203:24-204:24.

256. On October 4, 2022, Rothschild deleted most of his Twitter history (including the “contest” submissions), which he argued was allowed under the federal rules and First Amendment. **Authority:** Corrigan Decl., Exs. 94, 129.

Dated: October 7, 2022
New York, New York

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